

Respondent and its insurance carrier contend Judge Clark erred. They argue the evidence fails to establish that claimant's preexisting left knee problems were either aggravated or accelerated by her right knee injury. They also argue the Judge erred by granting claimant temporary partial disability benefits as claimant's right knee injury is a "scheduled" injury under K.S.A. 44-510d, which does not permit such benefits. Accordingly, respondent and its insurance carrier request the Board to modify the November 19, 2004 Order and deny claimant's request for workers compensation benefits for the left knee.

Conversely, claimant argues the preliminary hearing Order should be affirmed. In addition, claimant argues the Board does not have jurisdiction at this stage of the claim to review the Judge's order for medical treatment.

The only issues before the Board are:

1. Does the Board have jurisdiction at this stage of the claim to review the preliminary hearing finding that claimant injured or aggravated her left knee due to an accident at work?
2. If so, did claimant prove the medical treatment now recommended for her left knee is related to that accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

By authorizing Dr. Bradley W. Bruner to treat both of claimant's knees, the Judge implicitly found claimant's left knee condition was directly related to her accident at work, which the parties agreed arose out of and in the course of her employment with respondent.

The issue of whether a worker's injury arose out of and in the course of employment is specifically designated as an issue that is subject to Board review from a preliminary hearing order. K.S.A. 44-534a(a)(2) addresses the Board's jurisdiction over preliminary hearing findings and provides, in part:

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, **whether the injury arose out of and in the course of the employee's employment**, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. (Emphasis added.)

Accordingly, the Board has jurisdiction to review whether the evidence establishes that claimant has aggravated her left knee due to an accident that occurred at work.

The Board agrees with Judge Clark that claimant is entitled to receive workers compensation benefits, including medical benefits, for her left knee. The Board is persuaded by Dr. Bruner's testimony and opinions. The doctor, who first saw claimant in December 2001, testified that claimant's accident at work in April 2002 created both a scar tissue problem in her right knee (which was healing from surgery) and, more likely than not, a pain syndrome.

Dr. Bruner also testified claimant's ongoing right knee problems probably made the preexisting problems in her left knee symptomatic. And the doctor now recommends left knee surgery to address those symptoms. The doctor testified, in part:

Q. (Mr. Lee) Dr. Bruner, what affect, if any, do you feel the problem she's had since the right knee since her fall in April 26, '02 has had on her left knee and lower back? In other words, including the altered gait and the healing process and the whole thing.

A. (Dr. Bruner) . . . If it affects the left knee it's more of a tendonitis picture and this is an MRI that matches exactly before, it is not going to cause partial ACL tears or torn meniscus, but it will affect the left, to the effect of having some tendinitis and anterior knee pains and things like that.

Q. Is it going to make the problems that existed back in 2001 when she had her initial MRI, is it going to make those problems more symptomatic?

A. It should because she's going to favor, she's going to favor the right knee. She's going to have to put more weight on the left knee and it is going to cause that.

. . . .

Q. Okay. What I am asking though, doctor, she's had a significant problem with her right knee for, well, since April 26, '02, and even a little bit before that --

A. Right.

Q. -- that has caused her to walk with an altered gait, and probably caused her to put some additional pressure on her left knee. And in your opinion that probably has caused that knee to be somewhat more symptomatic. When you had the first MRI, doctor, back on 12-13-01, it looked the same as the MRI that you saw 8-9 of '02?

A. Right.

Q. But you are now recommending surgery on the left knee. Is that to relieve her of symptomatology that she has developed since the original MRI of 12-13 of '01?

A. That's correct.¹

¹ Bruner Depo. at 52-55.

An injury is compensable under the Workers Compensation Act when an accident at work only serves to aggravate a preexisting condition.² The test is not whether the accident caused a condition but whether the accident aggravated or accelerated a preexisting condition.³ And in this instance claimant has established that her accident at work and resulting right knee injury worsened the symptoms in her left knee, precipitating the need for left knee surgery.

For preliminary hearing purposes, claimant has established that she has aggravated her left knee as a result of her April 2002 accident and resulting right knee injury. Therefore, claimant is entitled to receive workers compensation benefits, including medical benefits and temporary partial disability benefits, for both knees.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁴

WHEREFORE, the Board affirms the November 19, 2004 Order entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of January 2005.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

³ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁴ K.S.A. 44-534a(a)(2).